UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GALAXY TOWERS CONDOMINIUM ASSOCIATION

Respondent

and Case No. 22-CA-030064

LOCAL 124, RECYCLING, AIRPORT, INDUSTRIAL & SERVICE EMPLOYEES UNION

Charging Party

RESPONDENT'S MOTION FOR JUDICIAL NOTICE OF THE NOVEMBER 28, 2012 OPINION OF UNITED STATES DISTRICT JUDGE WILLIAM J. MARTINI IN *GALAXY TOWERS CONDOMINIUM ASSOCIATION V. LOCAL 124 I.U.J.A.T.* AND TO APPLY JUDICIAL ESTOPPEL TO THE MAINTENANCE OF INCONSISTENT LEGAL POSITIONS BY THE GC AND UNION

Submitted by:

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Pursuant to Sections 102.24(a) and 102.47 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board") and Fed. R. Evid. 201, Respondent Galaxy Towers Condominium Association ("GTCA"), through its undersigned counsel, hereby respectfully requests that the Board take judicial notice of the November 28, 2012 Opinion of United States District Judge William J. Martini in *Galaxy Towers Condominium Association v. Local 124 I.U.J.A.T.*, Civil Action No.: 2:11-cv-04726 (WJM) ("the Opinion").[1] GTCA further respectfully requests that the Board apply the doctrine of judicial estoppel against the Counsel for the Acting General Counsel ("GC") and Charging Party Local 124, Recycling, Airport, Industrial & Service Employees Union ("Union") to prevent them from advancing a position inconsistent with that taken by the Union in the federal court case.

As more fully set forth in the Respondent's Brief in Support of its Motion, which is incorporated herein by reference, the Board should take judicial notice of the Opinion, and apply judicial estoppel for the following reasons:

1. A principal issue in this case is whether the Memorandum of Agreement ("MOA"), signed by the bargaining parties in early 2007, incorporated economic and/or non-economic tentative agreements ("TA") previously reached by the bargaining parties through collective bargaining. GTCA contends that the MOA incorporated both economic and non-economic TAs, including the parties' August 15, 2006 TA on management rights and subcontracting. (*See* GTCA's Answering Brief to GC's and Charging Party's Exceptions, at 20). The GC and the Union, conversely, have contended that the MOA incorporated only economic terms; leaving all non-economic terms – including the subcontracting TA – dependent on the bargaining

[1] A copy of this Opinion is attached hereto as Exhibit A.

parties' future agreement to a "complete" collective bargaining agreement ("CBA"). (*See* GC's Brief in Support of Exceptions, at 14).

2. Administrative Law Judge Steven Davis ("ALJ") agreed with GTCA's position in his September 25, 2012 Decision ("ALJD"), finding that the MOA incorporated the TA on subcontracting. (ALJD at 19, ll. 42-43). Based on this finding, the ALJ went on to conclude that GTCA was legally privileged to subcontract bargaining unit work on August 1, 2011. Obviously, the proper resolution of this issue is dispositive of virtually the entire case. (*Id.* at 20. ll. 18-25).
3. At the hearing before the ALJ, the GC and the Union, through the testimony of the Union's agents, argued that the MOA incorporated and made contractual only specified economic matters that the bargaining parties had agreed to, such as wages, paid-time-off days, vacation, and medical benefits. The GC and the Union further contended that non-superseded terms of (a) the bargaining parties' August 8, 2006 "Interim Agreement" and (b) the non-superseded terms of the CBA between GTCA and Local 734 L.I.U. of N.A., AFL-CIO ("Local 734"), the Union's predecessor as bargaining representative of GTCA's unit employees, continued to be binding on the bargaining parties. The GC and the Union have continued to advance this argument in their briefs in support of their exceptions. (*See, e.g.*, GC's Brief in Support of Exceptions, at 1-2; Exceptions of Charging Party Union, Local 124 to Administrative Law Judge Decision, at 2).
4. In the federal court case before Judge Martini, the Union – contrary to the position it and the GC have taken in this case – argued that bargaining parties were bound by contractual grievance and arbitration language providing that an unresolved grievance

could "be submitted to arbitration before Elliott Schriftman, Eugene Coughlin or Robert Herzog on a rotating basis." Opinion at 1 (quoting Affidavit of James Bernardone (Bernardone Aff.") at ¶¶2, 6 and Aff. Ex. A).[2] Judge Martini agreed with the Union's contention that the above-quoted language was binding on the parties, finding that GTCA had ineffectively tried to modify that provision to exclude Mr. Coughlin as an arbitrator. *Id*. at 3.

5. Judge Martini's Opinion is important because his findings are at odds with the position of the GC and the Union herein and, more importantly, supportive of the ALJ on the issue of the scope of the MOA.

6. As noted, the GC and the Union have argued in this case that the MOA did not incorporate any non-specified non-economic terms. Yet, in the federal court case, the Union argued – and Judge Martini found – that a non-economic term, the arbitration language, was a part of the bargaining parties' CBA.

7. The Union and the GC cannot have it both ways. The non-economic TAs reached by the bargaining parties cannot be contractual in the federal case and, in the case before the Board, be subject to future ratification.

8. Notably, the CBA excerpt attached to the Bernardone Aff. includes the very subcontracting language the Union and GC claim in this forum is not part of the contract between the bargaining parties. Bernardone Aff. at Ex. A, p. 17. (["Management of the Employer's operations and the direction of its working force, including the right to"] "***subcontract any work*** . . . shall be vested solely and

[2] James Bernardone was the Union's Secretary-Treasurer at the time he executed that Affidavit on August 23, 2011. The Bernardone Aff. is in the record of this case as R Ex. 29. Further, the document that the Union claims in that case is the CBA between the bargaining parties is in the record as GC Ex. 12.

exclusively in the Employer.")

9. Judge Martini found, based on the Union's argument, that the bargaining parties' CBA included the grievance and arbitration language contained in Ex. A to the Bernardone Aff. That exhibit also contained the subcontracting language at issue here. The Union cannot be permitted to argue in federal court that the grievance and arbitration language is contractual, while arguing here that the subcontracting language appearing just above is wholly irrelevant. In this regard, Judge Martini's Opinion is consistent with the ALJ's finding on this point.
10. As required under Fed.R.Civ. 201(c)(2), the Board, therefore, must take judicial notice of Judge Martini's Opinion and the relevant adjudicative facts contained therein. Further, the Board should accord the Opinion substantial, if not dispositive, weight based on the Union's judicial admission that the bargaining parties' CBA included non-economic TAs and Judge Martini's factual finding to that effect.
11. Further, the Board should apply the doctrine of judicial estoppel to estop the GC and the Union from advancing a position inconsistent with that successfully taken by the Union in the federal court case. Specifically, the Board should estop the GC and the Union from contending that the TA on subcontracting was not part of the MOA ratified by the bargaining parties. As a consequence, the Board should conclude on this alternative ground that GTCA's August 1, 2011 subcontracting of bargaining unit work was not unlawful.

Dated: December 31, 2012

Respectfully submitted,

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